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CITATIONS

Cases:

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

UTAH CONSTRUCTION AND MINING CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Acting Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the decision of the United States Court of Claims in this case, which was entered on December 11, 1964.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, pp. 19–39) is reported at 339 F. 2d 606. The memorandum of the commissioner of that court (App. B, *infra*, pp. 40–57) is unreported.

JURISDICTION

The opinion and order of the Court of Claims were entered on December 11, 1964. Respondent's timely petition for reconsideration was denied on March 12, 1965. By order entered on June 10, 1965, the Chief Justice extended the time for filing this petition to and

including August 9, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).[1]

QUESTIONS PRESENTED

1. Whether a court may take evidence *de novo* to resolve factual disputes in a suit on a government contract if the same factual issues have previously been resolved by the administrative board whose determination of "all disputes concerning questions of fact arising under this contract" is made "final and conclusive" by the standard disputes clause of the contract.

2. Whether factual disputes relevant to claims for breach of contract are covered by the provision of the standard disputes clause which requires the parties to submit for administrative determination "all disputes concerning questions of fact arising under this contract."

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[1] The order which the petition seeks to review is not a final judgment granting or denying relief, but it does finally determine the rights in issue—*i.e.*, the right to be free from a second evidentiary hearing in cases based upon government contracts containing a standard disputes clause. The jurisdictional statute (28 U.S.C. 1255) does not contain any requirement of finality, and its revisers stated, "Review under this section is unrestricted." 28 U.S.C., Reviser's Note to Section 1255, p. 5958. This Court has jurisdiction to review interlocutory orders of the Court of Claims which determine liability, entered prior to trial or determination of damages. *United States* v. *Caltex*, 344 U.S. 149; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155. We believe there is no material distinction between such interlocutory orders and the one at bar, which determined finally the rights of the parties on the issue upon which review is being sought.

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The pertinent provisions of the statute and the contract involved are set forth in Appendix C, *infra*, pp. 58–62.

STATEMENT

1. *Background.*—This case arose out of a contract, executed in March 1953, between the United States, acting through the Atomic Energy Commission, and respondent ("Utah" or "the contractor"), for the construction of an Assembly and Maintenance Area and Administration Area at the Aircraft Nuclear Propulsion Project of the National Reactor Testing Station in Jefferson and Butte Counties, Idaho, at a price of $4,583,028.20. The contract contained a standard government disputes clause (App. C, *infra*, p. 61) providing for the resolution of "all disputes concerning questions of fact arising under this contract" by the contracting officer and, upon timely appeal from his decision, by the duly authorized representative of the A.E.C., "whose decision shall be final and conclusive upon the parties." In addition, the contract contained standard clauses concerning "changes," "changed conditions" and "delays-damages." See App. C, *infra*, pp. 58–61. Work on the contract was completed on January 7, 1955.

During and subsequent to the performance of the contract, disputes arose between respondent and representatives of the A.E.C. Respondent submitted these to the contracting officer pursuant to the disputes clause. The contracting officer resolved them—some favorably to respondent and some adversely—

and assessed liquidated damages and other charges against respondent by reason of its failure to meet the original contractual schedule. Respondent took appeals to the A.E.C.'s Advisory Board of Contract Appeals from several of the contracting officer's decisions. As a result of negotiations between the parties, respondent agreed to waive or withdraw several of its claims, and the A.E.C. agreed to cancel its assessment for liquidated damages and other delay charges and to pay the remaining balance. All disputes between the parties were settled in this manner except for five claims which had been resolved by the contracting officer, four of which were then pending before the Board. App. B, *infra*, p. 41. These claims constitute the basis of the present controversy between the parties.

2. *Administrative Claims and Proceedings.*—Three of the four excepted claims requested relief under the "changed condition" clause of the contract (Art. 4), and one under the "changes" clause (Art. 4). The claims were for both increased compensation and extensions of time for performance, and the relief sought in the three claims filed under the "changed conditions" clause sought actual increases in the cost of performance and increased costs due to delay.

Three of the administrative claims[2] were heard before a panel of the A.E.C.'s Advisory Board consisting of Dean Robert Kingsley, of the School of Law of the University of Southern California, and

[2] The "pier drilling claim," the "shield window claim," and the "shield door claim."

Edmund R. Purvis, a consulting architect of Washington, D.C.[3] Adversary hearings were held before the panel, which ruled that its jurisdiction in regard to each matter before it was "clear," and it rendered decisions containing findings of fact.

On the "shield window claim" the Board found that the difficulties and delays were caused in part by inherent difficulties in the work, and it granted extensions of time. It found, however, that the drawings and specifications were accurate and adequate, and that the difficulties and delays were caused in large part because of respondent's inexperience ("Utah simply did not know how to do the job") and workmanship, and accordingly refused to grant additional compensation. On the "pier drilling claim," the Board agreed with respondent that changed conditions had been encountered which were not adequately described in the drawings or borings, and it remanded to the contracting officer to allow respondent to prove that it, not the subcontractor, bore the increased costs.[4] The Board found, however, that any delays encountered in pier drilling did not result in delays in the pouring of concrete or in the construction of the buildings, and accordingly denied (in that respect) the claims for extensions of time and for increased costs due to delay. On the "shield door claim," the Board ruled that there were no changes as to most of the matters complained of, and that,

[3] Under the regulations then in effect the Board consisted of persons who were not government employees.

[4] Respondent was not able to prove increased costs to itself, so its claim in that regard was closed.

where changes were made, the claims were untimely, having been asserted over a year after the event rather than in the ten days specified in Article 3. App. B, *infra*, pp. 41–42, 49–51, 52–53.

Respondent's appeal on the "concrete aggregate claim" was heard by an A.E.C. hearing examiner. Respondent relied upon the changed condition clause, which required notification by the contractor "immediately" upon discovery. The hearing examiner found that respondent was aware of the condition in July 1953 (it had made a claim of $8,640 in additional compensation at that time, which was paid), but that it had not submitted its present claim of $109,000 until July 1956. Accordingly, he ruled that "Utah has failed to promptly notify the Contracting Officer" of its $109,000 claim and dismissed it as untimely. Respondent did not seek Commission review of that decision as it was entitled to do under the A.E.C.'s rules of practice. App. B, *infra*, pp. 45–49.

3. *Proceedings in the Court of Claims.*—Respondent brought this action for damages (in the amount of $1,485,916.21) in the Court of Claims by petition filed in January 1961. The basic facts alleged in the petition were in large part the same facts asserted by respondent as the basis of the five claims pending administratively (the claims excepted from the release). In addition to the specific claims, respondent alleged that the government's delays, misrepresentations and failures to perform in accordance with express or implied warranties resulted in delays and increased expenditures on its part, and estimated that 90 percent of its increased costs were due to

government-caused delays. At the same time, the petition alleged that respondent had performed within the contract period as extended by mutually agreed upon modifications and change orders.

In the proceedings before the commissioner, respondent took the position that the controversies did not "arise under" the contract, and hence were beyond the scope of the disputes clause so that evidence could be taken *de novo* consistently with *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709. The government contended that the disputes were of the kind "arising under" the contract within the scope of the disputes clause, so that the court proceedings should be confined to a judicial review of the administrative record. The commissioner ruled that the contractor was entitled to a *de novo* trial on each of the four claims (App. B, *infra*, pp. 43–45, 47–48, 51–52, 53–55).

The government sought review of the commissioner's order. The Court of Claims ruled that the language in the standard disputes clause providing an administrative remedy for "disputes concerning questions of fact arising under this contract," (p. 22, *infra*):

> * * * means a dispute over the rights of the parties given by the contract; it does not mean a dispute over a violation of the contract.

The court distinguished between the two kinds of claims in the following example (pp. 24–25, *infra*):

> For example: The contracting officer makes a change in the contract and the contractor asks for the increase in his cost as a result of the

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change and for an extension in time for the delay incident thereto. The contracting officer allows him a sum for the increase in cost and determines he has been delayed X days. The contractor thinks he has been delayed more than X days, but his only recourse is an appeal to the head of the department whose decision is final because this is a dispute arising under the contract. In the absence of action which is arbitrary, etc., this is the end of the matter, so far as increased costs and extension of time are concerned, for all findings of fact of the contracting officer and head of the department in such disputes are final and conclusive.

But the contractor still thinks he has been delayed more than X days and he further thinks the delay was so unreasonable as to amount to a breach of contract, so he sues for damages for the breach. In such an action the findings of fact of the contracting officer are not final, because this is not a dispute "arising under the contract." It is only as to those disputes that the contract does make his findings final. In a suit for a breach because of an unreasonable delay, the court, in order to determine whether the delay was unreasonable and, hence, a breach of the contract, must determine the extent of the delay. In such a dispute the parties did not agree that the decisions of the contracting officer should be final and conclusive.

The majority of the Court of Claims went on to rule that the administrative resolution of factual disputes which were relevant to claims "arising under" the contract (and thus properly decided under the dis-

putes clause under its construction of that clause) were not binding upon the parties in a suit for breach of contract. The majority therefore affirmed the commissioner's ruling that the case should proceed to a trial *de novo* on three of the four claims [5] and ruled that the "shield door claim" was one "arising under" the contract, so that the administrative determination was binding. Judge Davis dissented [6] on the ground that the administrative determination of factual disputes, properly made under the disputes clause after full hearing, should be binding upon the parties in subsequent judicial actions for breach of contract.

REASONS FOR GRANTING THE WRIT

In this case the Court of Claims has announced and applied a general rule of prospective application regarding the scope of the standard disputes clause of government contracts and the effect of administrative decisions rendered thereunder. Consequently, the rule applied in this case will govern the nature of judicial proceedings in most of the government contract cases now pending in the Court of Claims, involving claims of more than $180,000,000, and in cases which will be filed there based upon present government contracts. We believe that the rule announced here by the Court of Claims is inconsistent with principles previously established by this Court,

[5] As for the claim for concrete aggregate, the court declined to indicate whether it believed that it was a "breach" claim or an "arising under" claim since the A.E.C. examiner had not reached the merits of the claim but had rejected it as untimely.

[6] Chief Judge Cowen concurred with the majority without reaching the issue on which Judge Davis dissented.

conflicts with the language of the disputes clause itself, and is at odds with the rule adopted by courts of appeals. Review by this Court is necessary to resolve the important and recurring issue presented by this case, and to eliminate the confusion and uncertainty engendered by decisions of the Court of Claims on this subject in the past two years.[7]

1. In *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, this Court disapproved the prior practice of the Court of Claims whereby it received evidence *de novo* in virtually all government contract cases, even though the facts had already been determined administratively pursuant to the terms of the standard disputes clause of such contracts. The Court held, with regard to disputes covered by the clause, that judicial proceedings should be limited to review of the administrative findings and record.[8]

In this case the Court of Claims has in large part deprived the *Bianchi* rule of practical effect by holding that factual disputes relating to claims for "breach of contract" must be determined by a judicial trial in which new evidence may be presented, even if they have already been decided administratively.

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[7] We are also seeking certiorari in *United States* v. *Anthony Grace & Sons, Inc.*, 345 F. 2d 808, a case involving a related but somewhat different application of the disputes clause by the Court of Claims.

[8] Although the issue of the coverage of the disputes clause was tendered by the government in that case, and a major part of the contractor's claim there was for delay damages (see 157 Ct. Cl. 432, 460-461, 466-467; Record, No. 529, O.T. 1962, pp. 9, 11), the contractor conceded that the disputes were covered by the disputes clause. Consequently this Court was not required to rule on that issue. 373 U.S. at 714.

Claims for "breach of contract," involve the same kinds of factual issues and, indeed, usually turn on the identical factual disputes involved in claims "arising under" the same contract (pp. 16–17, *infra*). The result of the rule adopted by the Court of Claims, therefore, is to require, at the request of either party, two evidentiary hearings on the same or closely related factual issues with respect to every contractual dispute which can be framed as both a "breach" claim and an "arising under" claim.

The effect is vividly demonstrated by the court's disposition of the claims presented by this case. The "pier drilling claim" is illustrative. Before the contracting officer and the Board, respondent claimed increased drilling costs of $17,934.63, a time extension of eleven months for delays and $83,431.46 for increased costs of building construction due to delays, all attributed to the existence of loose or "float rock" which constituted a "changed condition" under Article 4 (App. C, *infra*, p. 59), not disclosed on the drawings or borings. The Board found, after a full-scale adversary hearing which produced a voluminous record, that respondent had encountered subsurface float rock which was a changed condition within the meaning of Article 4, and that this changed condition resulted in some increases in the cost of drilling to the subcontractor and in some delay. The Board ruled, however, that respondent had not shown any increased cost to it and that any delays caused by the float rock did not result in delays in pouring the concrete or in completing the contract. Accordingly, the Board denied respondent's claims for an extension of time

and for increased compensation for such delays.* Under the rule adopted by the Court of Claims, however, the parties are not bound by the evidence presented to the Board, and respondent is entitled to a second evidentiary hearing on all the facts relating to such delays.

This "duplication of evidentiary hearings" imposes "a heavy additional burden in the time and expense required to bring litigation to an end." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 717. Such a duplication of effort, expense, and time is inconsistent with an orderly system for the administration of justice, and this Court should be and has been "loath to condone any procedure under which the need for expeditious resolution would be so ill-served." *Ibid.*

2. The rule adopted by the Court of Claims is, we submit, contrary to the language and policy of the disputes clause and the governing statute. The standard disputes clause applies in terms to "all disputes concerning questions of fact arising under this contract" and makes the administrative determination thereunder "final and conclusive upon the parties thereto" (p. 61, *infra*). The Wunderlich Act, 41 U.S.C. 321 (p. 58, *infra*), makes such administrative factual decisions "final and conclusive" unless "arbitrary" or "not supported by substantial evidence."

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*The Board believed that it had jurisdiction over respondent's claims for delays as well as for increased costs. But even under the dichotomy adopted by the Court of Claims, which would apparently bar the Board from considering claims for "unreasonable" delays, the Board concededly had authority to act upon respondent's request for an extension of time, and in so doing was obliged to resolve the factual disputes underlying that claim.

Hence both the contract and the statute render final (subject only to judicial review on the administrative record) facts which are litigated and decided administratively pursuant to the disputes clause. Neither the clause nor the statute limits the rule of finality to claims which may be heard by the administrative boards; the factual determinations are final, so far as the litigating parties are concerned, for all purposes. Certainly, the most reasonable construction of this language is that the parties are estopped with regard to all factual findings made by the administrative board unless they are "arbitrary" or "not supported by substantial evidence."

One of the purposes of the Wunderlich Act was "to require each party to present openly its side of the controversy and afford an opportunity of rebuttal" at the administrative hearings. H. Rep. No. 1380, 83d Cong., 2d Sess., p. 5. As this Court has previously recognized, this Congressional purpose "would be frustrated if either side were free to withhold evidence at the administrative level and then to introduce it in a judicial proceeding." *United States* v. *Carlo Bianchi Co.,* 373 U.S. 709, 717. Yet that result follows from the decision of the Court of Claims here.

3. The decision below conflicts with cases decided by the courts of appeals. In *United States* v. *Peter Kiewit Sons' Co.,* C.A. 8, No. 17,869, decided June 1, 1965, for example, the court held that factual disputes concerning a contractor's claim for unliquidated damages were within the scope of the disputes clause, and that a contracting officer's decision in regard to them should be accorded finality,

notwithstanding the contractor's contention, based upon the decision of the Court of Claims in this case,[10] that the administrative determination should have no effect because the claim was one for breach of contract. Courts of appeals have consistently held that if factual issues are litigated and determined administratively under the disputes clause, the administrative findings are (unless arbitrary or unsupported by evidence) binding upon the court irrespective of the nature of the claim made in court. See *Allied Paint & Color Works* v. *United States*, 309 F. 2d 133, 138 (C.A. 2); *United States* v. *Hamden Co-operative Creamery Co.*, 297 F. 2d 130, 133–135 (C.A. 2); *Silverman Bros.* v. *United States*, 324 F. 2d 287, 289–290 (C.A. 1).

4. Agreeing, in the respects stated above, with Judge Davis' dissent, we present a further contention. The disputes clause encompasses "all disputes concerning questions of fact arising under this contract." This, we suggest, applies to all factual disputes concerning rights and duties created or defined by the contract, at least insofar as the factual issues are of the kind committed to administrative determination by the contract.[11]

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[10] See Brief for Appellee, in C.A. 8, No. 17,869, pp. 14–16.

[11] A case or controversy "arises under" the Constitution or an Act of Congress if the cause of action had its origin in and is controlled by federal law—*i.e.*, if federal law creates the cause of action. *Peyton* v. *Railway Express Agency*, 316 U.S. 350, 352–353; *American Well Works Co.* v. *Lane & Bowler Co.*, 241 U.S. 257, 260. Similarly, we believe, a factual dispute "arises under" the contract within the meaning of the disputes clause, if the contract creates and defines the rights and duties of the parties in regard to the subject matter of the dispute.

The majority opinion of the Court of Claims distinguishes between factual disputes concerning "the rights of the parties given by the contract"—which it regards as disputes "arising under" the contract within the meaning and coverage of the disputes clause—and disputes "over a violation of the contract"—which it considers to be "breach" disputes, outside the coverage of that clause (p. 22, *infra*). But every claim by a party regarding his rights under a contract necessarily amounts to a claim that the other party failed to honor those rights and thereby violated the contract. No satisfactory distinction can be drawn between disputes "arising under" the contract and those concerning "breach" claims; any right sounding in contract can, we submit, be structured to fit either category.[12] Indeed, without discussion, this Court has, in two instances, ruled that claims which the Court of Claims would now classify as "breach" claims did arise under the contract and were covered by the disputes clause. See *United States* v. *Blair*, 321 U.S. 730, 734–735; *United States* v. *Holpuch*, 328 U.S. 234.

Considerations of policy likewise weigh against the attempted distinction. Even under Judge Davis' dissenting view, the party losing before the administra-

[12] The classic "breach" case—a total failure by one party to perform what it has promised to do—can be viewed as a suit to enforce the other party's right to performance, which is a right "arising under" the contract.

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tive tribunal [13] would be permitted to obtain a second evidentiary hearing if it alleges facts concerning its breach claim which were not actually litigated and decided administratively. This invites a contractor to split his claims and theories under different headings, reserving some (by way of insurance) for a second round. It also affords him the option of short-circuiting the administrative process entirely by suing immediately on a breach theory, thereby avoiding the administrative determinations contemplated by the disputes clause.[14] In either event, there is a frustration of the arbitral function which the comprehensive disputes clause is designed to serve.

At the least, when (as here) factual disputes relate to claims which are of the kind clearly committed to administrative determination by the contract, they should be held to fall within the disputes clause. In this case, for example, standard contractual provisions (Articles 3, 4, and 9) clearly committed to agency determination factual disputes over whether delays were caused by matters within the control of the contractor, and whether unforeseen and changed conditions resulted in any increased cost or delay. Since the asserted "breach" claims turned on factual issues

[13] While the government, acting through the General Accounting Office, does not often seek judicial relief contrary to a Board ruling, it has the authority to do so, and does on some occasions.

[14] The Court of Claims sanctioned this procedure in its recent decision in *Universal Ecsco Corp.* v. *United States*, 345 F. 2d 586.

of the same kind, they, too were within the Board's primary jurisdiction.[15]

[15] The Court of Claims relied partly upon the asserted lack of authority of the agencies who administer the contracts to pay claims for unliquidated damages, particularly those for delay damages. See p. 21, *infra; Continental Illinois National Bank* v. *United States*, 126 Ct. Cl. 631, 640–641, 115 F. Supp. 892, 897. The agencies have frequently asserted that they lack authority to pay such claims, but these disclaimers originated from the absence of statutory authority to pay. Shedd, *Disputes and Appeals*, 29 Law & Contemp. Probs. 39, 57. Where the factual disputes are closely related to those involved in claims upon which the contract expressly authorizes the agency to grant relief, the usual practice is for the agency to hear and determine all the factual disputes. While the agency itself may not be able to grant full relief in such circumstances, the government, acting through the General Accounting Office, clearly has authority to do so upon appropriate agency findings. 31 U.S.C. 71. If that office refuses to pay, the contractor is free to sue on the basis of the administrative findings and record, just as the government does where it sues affirmatively asserting breach of contract by the contractor. *E.g.*, *United States* v. *Hamden Co-operative Creamery Co.*, 297 F. 2d 130 (C.A. 2); *Silverman Bros.* v. *United States*, 324 F. 2d 287 (C.A. 1). While we do not believe that express authority under the contract to grant relief is a necessary prerequisite to coverage under the disputes clause, we reserve our right to show that in this case there was such authority. See GC–25, pp. 61–62, *infra;* and *Bateson Construction Co.* v. *United States*, 319 F. 2d 135 (Ct. Cl.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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AUGUST 1965.

APPENDIX A

In the United States Court of Claims

No. 3–61

(Decided December 11, 1964)

UTAH CONSTRUCTION AND MINING COMPANY v. THE UNITED STATES

Gardiner Johnson for plaintiff. *Thomas E. Stanton, Jr.*, and *Charles J. Heyler* of counsel.

Irving Jaffe, with whom was *Assistant Attorney General John W. Douglas*, for defendant. *James F. Merow* was on the briefs.

Before COWEN, *Chief Judge*, DURFEE, DAVIS, and COLLINS, *Judges*, and WHITAKER, *Senior Judge*.

ON DEFENDANT'S REQUEST FOR REVIEW OF COMMISSIONER'S ORDER

WHITAKER, *Senior Judge*, delivered the opinion of the court:

Plaintiff had a contract with the Atomic Energy Commission for the construction of an assembly and maintenance area at the National Reactor Testing Station in Jefferson and Butte Counties, Idaho. The contract was fully performed on January 7, 1955, several extensions of time having been granted on account of delays for which the contractor was not responsible. During the performance of the contract and after its completion, plaintiff made various claims for increased costs and for damages, some of which were claims

arising under the contract and some for alleged breaches of contract by the defendant on account of delays and other causes.

The case was referred to Trial Commissioner C. Murray Bernhardt for the taking of testimony and for a report. On February 18, 1964, the commissioner issued an order defining the scope of the testimony to be taken with reference to the several claims, in the light of the Supreme Court's opinion in *United States* v. *Bianchi*, 373 U.S. 709 (1963). The defendant now asks us to review this order.

Prior to *United States* v. *Wunderlich*, 342 U.S. 98 (1951), this court had held that in determining whether or not the action of the contracting officer or the head of the department was arbitrary or capricious or unsupported by substantial evidence or otherwise contrary to law, it was not confined to the evidence before the Board of Contract Appeals (which in most cases was the representative of the head of the department), but was entitled to receive evidence *de novo*. However, the Supreme Court in *United States* v. *Wunderlich*, *supra*, held that we were bound by the action of the contracting officer on claims arising under the contract unless his action was fraudulent; that is to say, unless it amounted to conscious wrongdoing. Following this decision, the Congress enacted what is known as the Wunderlich Act, being the Act of May 11, 1964, 68 Stat. 81. This act in substance provided that the decision of the head of a department or his duly authorized representative or board "in a dispute involving a question arising under such contract * * * shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

Following the enactment of this statute, this court first held in *Wagner Whirler and Derrick Corp.* v. *United States*, 128 Ct. Cl. 382, 121 F. Supp. 664 (1954), that the Wunderlich Act was designed to restore the *status quo ante* the decision of the Supreme Court in *United States* v. *Wunderlich*, *supra*, but we did not decide in that case whether or not *de novo* evidence was admissible to determine whether the action of the board was arbitrary, etc. However, in *Volentine and Littleton* v. *United States*, 136 Ct. Cl. 638, 145 F. Supp. 952 (1956), we explicitly held that since the purpose of Congress

was to restore the *status quo ante* and since the practice prior to the *Wunderlich* decision had been to receive evidence *de novo*, we would continue to do so. We reiterated this position in *Bianchi* v. *United States*, 144 Ct. Cl. 500, 169 F. Supp. 514 (1959), 157 Ct. Cl. 432 (1962); but the Supreme Court reversed and held that in the determination of this question we were confined to the evidence admitted before the board. *United States* v. *Bianchi*, 373 U.S. 709 (1963).

In cases where the administrative record was defective or inadequate, the Court had this to say:

> * * * *First*, there would undoubtedly be situations in which the court would be warranted, on the basis of the administrative record, in granting judgment for the contractor without the need for further administrative action. *Second*, in situations where the court believed that the existing record did not warrant such a course, but that the departmental determination could not be sustained under the standards laid down by Congress, we see no reason why the court could not stay its own proceedings pending some further action before the agency involved. Cf. *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202. Such a stay would certainly be justified where the department had failed to make adequate provision for a record that could be subjected to judicial scrutiny, for it was clearly part of the legislative purpose to achieve uniformity in this respect. And in any case in which the department failed to remedy the particular substantive or procedural defect or inadequacy, the sanction of judgment for the contractor would always be available to the court. [373 U.S. 709, 717–18.]

Where the dispute "arises under the contract" the contracting officer and the head of the department have authority to decide questions of fact and the contract makes their decision thereon final and conclusive; but where the dispute involves an alleged breach of the contract, and the contractor seeks unliquidated damages therefor, neither the contracting officer nor the head of the department has jurisdiction to decide the dispute. *Miller, Inc.* v. *United States*, 111 Ct. Cl. 252, 77 F. Supp. 209 (1948); *Langevin* v. *United States*, 100 Ct. Cl. 15 (1943); *B–W Construction Co.* v. *United States*, 101 Ct. Cl. 748 (1944); reversed in part on other grounds, *United States* v. *Beuttas, et al.*, 324 U.S. 768 (1944). If they undertake to do so—which they rarely do—

neither their decision nor the findings of fact with reference thereto have any binding effect. This necessarily follows because they are without authority to decide the dispute. It goes without saying that a decision of any court or other agency on a matter concerning which it has no jurisdiction has no binding effect whatsoever. *Steamship Co.* v. *Tugman*, 106 U.S. 118, 122 (1882); *Coyle* v. *Skirvin*, 124 F. 2d 934, 937 (10th Cir. 1942), and cases there cited. See also *Petition of Taffel*, 49 F. Supp. 109, 111 (S.D.N.Y. 1941).

Defendant contends that since the contract gives to the contracting officer and the head of the department authority to make findings of fact concerning *all* disputes, they have authority to make findings concerning a dispute over whether the contract had been breached. This contention cannot be sustained. The contract plainly limits their authority to make such findings to "disputes concerning questions of fact *arising under this contract.*" This means a dispute over the rights of the parties given by the contract; it does not mean a dispute over a violation of the contract.

The Supreme Court's opinion in *Bianchi*, *supra*, restricting the evidence to be considered by this court to the record before the Appeals Board, is expressly limited to "matters within the scope of the disputes clause." At page 714 the Court said:

> Respondent has not argued in this Court that the underlying controversy in the present suit is beyond the scope of the "disputes" clause in the contract or that it is not governed by the quoted language in the Wunderlich Act. Thus the sole issue, as stated *supra*, p. 710, is whether the Court of Claims is limited to the administrative record with respect to that controversy or is free to take new evidence. * * *
>
> It is our conclusion that, apart from questions of fraud, determination of the finality to be attached to a departmental decision on a question arising under a "disputes" clause must rest solely on consideration of the record before the department. This conclusion is based both on the language of the statute and on its legislative history.

Finally, in conclusion, the Court said:

> * * * We hold only that in its consideration of matters within the scope of the "disputes" clause in the present case, the Court of Claims is confined to review

> of the administrative record under the standards in the Wunderlich Act and may not receive new evidence. * * * [373 U.S. 709, 718.]

The opinion of the Supreme Court was thus restricted to "matters within the scope of the disputes clause." An action for breach of contract is not within the scope of this clause.

However, it may be that the contracting officer and the head of the department may find a fact relevant to the settlement of a dispute arising under the contract, which fact may also be relevant on the question of the right of the plaintiff to recover for breach of contract. What effect is to be given to such a finding?

Let it be noted that no statute gives the contracting officer and the head of the department, or his representative, authority to decide the rights of the parties to a Government contract; their authority is derived solely from the contract between the parties. *Langevin* v. *United States*, *supra*, at 30.

The contract in Article 15 provides that "all disputes concerning questions of fact *arising under this contract* shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto." (Emphasis added.) Thus, the board's authority is limited to disputes "concerning questions of fact *arising under this contract*." It is only such disputes which the contracting officer and the head of the department have jurisdiction to resolve and on which their findings of fact are final and conclusive. The parties did not contract that *their findings of fact should be conclusive in suits for breach of contract*. In such suits the contract does not bind a judicial tribunal to accept their findings, although they may have been relevant to a dispute "arising under the contract."

Had plaintiff been permitted to submit the dispute over what it was claiming to a judicial tribunal established by Congress with authority to find the facts and decide the dispute, and it had done so, plaintiff, under the doctrine of collateral estoppel, would have been bound by the tribunal's findings, both in the cause of action submitted and in a later proceeding between the same parties on a different cause of action. *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948). The reason for this rule is to save the time of the courts and to

protect a litigant from having to relitigate an issue previously submitted to a judicial tribunal and decided by it.

But neither the contracting officer nor the head of the department, or his representative, is a judicial tribunal created by Act of Congress; they derive their authority solely from the contract between the parties, and their authority is limited by the terms of the contract. That contract authorizes them to make findings and to decide disputes "arising under the contract." It is only as to such disputes that their findings and decisions are made final and conclusive. It does not make them final and conclusive on a dispute over whether there has been a breach of the contract.

When a party submits his case to a judicial tribunal, he does so in light of the rule that its findings of fact are binding on him, not only in that litigation, but in all other litigation between the same parties. But this rule does not apply where a contract requires him to submit his claim, not to a judicial tribunal, but to a person designated by the contract; in such case he does so subject only to the terms of the contract, and the effect of the findings and decision of the designated person is that set out in the contract and no more.

So, when a party appeals to a judicial tribunal to determine whether the other party has breached the contract, it is not bound by a finding of a person only authorized to decide disputes "arising under the contract," and it is entitled to ask the judicial tribunal to make its own findings and render its decision based on those findings. Since this is the first time that recourse has been had to a judicial tribunal, that tribunal not only may, but it is obligated, to make its own findings. Never before has the contractor "had his day in court."

For example: The contracting officer makes a change in the contract and the contractor asks for the increase in his cost as a result of the change and for an extension in time for the delay incident thereto. The contracting officer allows him a sum for the increase in cost and determines he has been delayed X days. The contractor thinks he has been delayed more than X days, but his only recourse is an appeal to the head of the department whose decision is final because this is a dispute arising under the contract. In the absence of action which is arbitrary, etc., this is the end of the matter,

so far as increased costs and extension of time are concerned, for all findings of fact of the contracting officer and head of the department in such disputes are final and conclusive.

But the contractor still thinks he has been delayed more than X days and he further thinks the delay was so unreasonable as to amount to a breach of contract, so he sues for damages for the breach. In such an action the findings of fact of the contracting officer are not final, because this is not a dispute "arising under the contract." It is only as to those disputes that the contract does make his findings final. In a suit for a breach because of an unreasonable delay, the court, in order to determine whether the delay was unreasonable and, hence, a breach of the contract, must determine the extent of the delay. In such a dispute the parties did not agree that the decisions of the contracting officer should be final and conclusive.

In any case we would so construe the contract between the parties, but in this case there is a compelling reason to strictly limit the contract to its precise terms. It is well known that anyone seeking a contract with the Government must be willing to agree to accept the contract drawn by the Government; indeed, the advertisement for bids so stipulates. These contracts all contain this "disputes" clause, which makes the arbiter of the dispute in the first instance the contracting officer, who is the Government's servant and employee, and whose prime duty is to be diligent in the protection of the Government's interests and to require that the contractor strictly comply with the terms of the contract. The transition from such a role to that of an impartial arbiter in the settlement of a dispute between himself, or his representative, and the contractor would seem to be somewhat difficult. An appeal from the findings and decision of the contracting officer is allowed to the head of the department, but he, too, is an officer of the Government, the opposite contracting party. This is an additional and a cogent reason for limiting this provision of the contract to its precise terms. See *Langevin* v. *United States*, *supra*; *B–W Construction Co.* v. *United States*, *supra*; and *Miller, Inc.* v. *United States*, *supra*.

The Atomic Energy Commission's Advisory Board of Contract Appeals in the *Appeal of Utah Construction Com-*

pany (Docket No. 91) recognized its lack of jurisdiction to decide or to make findings concerning damages for breach of contract. It said:

> It is clear, in the light of the Board's decision in Appeal of Claremont Construction Company (Docket No. 64), that, not only does the Contractor's appeal on the issue of damages raise issues solely of law, but that this dispute is as to a matter "relating to" and not one "arising under" the contract. The Board has discussed this distinction at length in both that Claremont case and in Appeal of Frontier Drilling Company (Docket No. 74). The reasoning need not be repeated here. As to this issue, the appeal should be dismissed as not within the jurisdiction of the Board.

In conclusion, we hold that in a suit for breach of contract we are not bound by a finding of fact of the Board of Contract Appeals even though that finding is relevant to "a dispute arising under the contract."

With these general principles in mind, we proceed to consider the commissioner's order with respect to the several claims. The commissioner divides them into these six categories, (1) with respect to the pier drilling, (2) the concrete aggregate, (3) the shield windows, (4) the shield door, (5) the Amercoat paint, and, finally, the delay damages claim.

1. *Pier Drilling Claim.*

Plaintiff claims that in the drilling and excavation for "piers," or foundation shafts for certain buildings, it encountered subsurface conditions differing materially from those indicated in the contract documents. First, it claimed additional compensation for the extra cost of drilling the "float rock" which it had encountered and which it claimed was not shown on the contract documents. This claim was denied by the contracting officer on the ground that no changed conditions had been encountered. The Advisory Board of Contract Appeals, the representative of the head of the Atomic Energy Commission, reversed and found that the float rock did constitute a changed condition but that no additional cost had been incurred by plaintiff thereby unless it was liable therefor to its drilling subcontractor. The claim was remanded to the contracting officer to determine the amount of the increased cost of drilling.

Certain letters have been filed with the commissioner to indicate that plaintiff did not further prosecute its claim for increased cost and, hence, neither the contracting officer nor the board allowed plaintiff any sum therefor.

The commissioner holds plaintiff is not entitled to recover in this court therefor by reason of failure to exhaust its administrative remedy. The commissioner was correct in affirming the action of the board since this question was a dispute "arising under the contract."

Plaintiff also claims damages for delay by reason of the refusal of the contracting officer to modify the contract on account of the changed conditions encountered. Since this is an action for breach of contract, the parties are not bound by the decision of the board and may introduce evidence *de novo* concerning any unreasonable delay that may have been occasioned thereby.

In *United States* v. *Rice*, 317 U.S. 61 (1942), it was held that, where a contract was modified on account of changed conditions encountered, the contractor was entitled to increased costs and an extension of time, but not to damages incident to the delay. However, where the contracting officer delays unreasonably in modifying the contract, the contractor is entitled to recover damages for such part of the delay as was unreasonable. *McGraw & Co.* v. *United States*, 131 Ct. Cl. 501, 506, 130 F. Supp. 394 (1955), and cases cited. Here the contract was not modified until after completion of the work.

It is not apparent how this could have delayed plaintiff because plaintiff has failed to show that the changed conditions increased its costs, but if it was unreasonably delayed, plaintiff is entitled to recover for breach of contract.

2. *Concrete Aggregate Claim.*

The contract allowed the contracting officer to purchase concrete aggregate from the Government's supplies and the contractor did so. Early in the performance of the contract it was discovered that the concrete did not have the required strength and that the dirty condition of the aggregate was responsible therefor. To supply the necessary strength, the contracting officer required plaintiff to add one sack of cement to each cubic yard of concrete mix during the time the Government was washing the concrete so as to bring it

up to specification requirements. Plaintiff submitted to the contracting officer a claim for the extra cement used and was reimbursed therefor.

More than a year after the contract had been completed, plaintiff filed a claim for additional costs incurred because of the poor condition of the aggregate. The contracting officer was of the opinion that this additional claim of the plaintiff was one for breach of contract and, therefore, one which he had no authority to decide under the terms of the "disputes" article. He also thought the claim was untimely.

Plaintiff appealed to the head of the department. The Advisory Board of Contract Appeals dismissed the claim for failure of the plaintiff to make timely presentation of it.

If this claim be one for breach of contract, as our commissioner supposes, we have jurisdiction to determine it and to receive evidence *de novo*.

However, assuming the claim is not for breach of contract, we cannot agree with the commissioner that the failure of the board to consider the case on its merits gives plaintiff the right to introduce evidence *de novo* in this court. If we decide the board should have considered the claim on its merits, we should suggest to the board that it consider it on the merits and suspend proceedings here until it has had a reasonable opportunity to do so.

3. *Shield Windows Claim.*

Under the original contract defendant undertook to furnish the shield windows to be installed in the building to be constructed, but by modifications 2 and 4 thereof, plaintiff was required to negotiate a contract with the Corning Glass Works for the procurement of these shield windows, which it did.[1] The windows were supposed to comply with contract specifications and with the shop drawings and samples. Plaintiff complains that defendant unreasonably delayed in approving the shop drawings. It also says that the designated authority first approved the type II windows but that other agents of the defendant later rejected them and still later the defendant reversed its rejection and again approved

[1] These shield windows were designed to permit observation of what was going on within the atomic reactor without subjecting the observer to radioactive radiation.

them. It also alleges delay in connection with the approval of type I windows.

The plaintiff presented its claim on this item for a time extension for excusable delay and an equitable adjustment for increased costs under the Changed Conditions article of the contract. The commissioner states that he cannot determine from the record what part of the claim arises under the contract and what part of it is for damages for delay; but he concludes that the basic issue is whether or not the plaintiff was unreasonably delayed by acts of the Government. As to such claim he properly says that the decision of the head of the department is not final and *de novo* evidence may be introduced in this court.

Defendant's contention that the filing of the claim for delay with the contracting officer under the Changed Conditions article forecloses plaintiff from bringing suit for damages for delay cannot be sustained. The contracting officer could only grant an extension of time for delay (*United States* v. *Rice*, *supra*); he could not award damages for unreasonable delay.

It appears that the board over a period of 3 days heard testimony with respect to this claim, including the claim for delays, and that the transcript of this testimony runs to 453 pages, and that many exhibits were filed; hence, the commissioner suggests that the parties might well agree to stand on this record, with permission to supplement it with respect to the delay claim to such extent as they think proper. Certainly the parties ought to desist from duplicating the administrative record but, insofar as the claim relates to damages for unreasonable delay, the parties are not foreclosed by it nor from supplementing it, if they wish.

4. *Shield Door Claim.*

This claim was presented under the Changes article of the contract under which the contractor asked for extra costs by reason of a change in the drawings and specifications. The contracting officer disallowed the claim because it was not presented within 10 days as required by Article 3 of the contract.

After completion of the work, final payment was made to the contractor and a release was signed by it from which it excepted certain claims, including this shield door claim.

According to defendant's answer, which is not rebutted by plaintiff, it released the Government "from all claims arising under, in connection with or by virtue of the subject contract and all modifications thereto with the exception of the shield window claim, the pier drilling claim, and the shield door claim, the concrete aggregate claim, and the sum of $5,606.39 which was withheld pending a decision in the Amercoat appeal." The claim presented to the contracting officer with respect to the shield door did not advance any claim for increased costs on account of delays. If the release signed by plaintiff reads as set out in the Government's answer, it must be said that the Government was thereby released from all claims not specifically excepted, whether arising under the contract or in breach of the contract. *United States* v. *William Cramp & Sons*, 206 U.S. 118 (1907); *Watts Construction Co.* v. *United States*, Ct. Cl. No. 351–61, decided May 10, 1963. The exception of "the shield door claim" must have referred to the claim presented to the contracting officer. As stated, that claim did not refer to damages for delay. Hence, the commissioner is correct in saying that any evidence with reference to damages for delay on account of the shield door is inadmissible, because foreclosed by the release.

As to the claim made for extra work on account of changes made in the shop drawings, this is a claim "arising under the contract" and was within the authority of the contracting officer to determine. The contracting officer disallowed the claim because it was not presented within 10 days as required by Article 3 of the contract. The board held that a part of plaintiff's claim for extra costs must be disallowed because it did not constitute changes under the Changes article, and as to that part which did constitute changes the board held that it was barred by the failure of the plaintiff to present its claim within the 10-day period. These decisions, both of the contracting officer and of the board, were within their province. There is no allegation of arbitrary and capricious action and, hence, we have no jurisdiction to review the action of the board. It is, therefore, immaterial for the purposes of this motion that no record was made of the board's proceedings.

5. *The Amercoat Paint Claim.*

In the release signed by the plaintiff, according to the defendant's answer, it "excepted therefrom the sum of $5,606.39 which was withheld pending a decision in the Amercoat appeal." This sum was subsequently paid plaintiff and, therefore, defendant has been relieved from all liability with respect to this Amercoat paint claim.

The commissioner's order of February 18, 1964, is amended accordingly.

Defendant's motion for partial summary judgment may be filed, but the same is overruled with leave to renew as to any matters contained therein not ruled upon in this opinion.

COWEN, *Chief Judge*, concurring in the result:

I concur with the majority and Judge Davis in rejecting the Government's sweeping contention that *de novo* evidence is inappropriate with respect to any factual question connected with the contract, regardless of the nature of the contractor's claim or the authority of the agency board or head of the department to decide the dispute to which such factual questions are related. For the reasons stated in both opinions, defendant's position, that the Disputes clause requires the administrative agency to make binding factual determinations on every question relating to the contract, is untenable.

It should be emphasized that we have before us only the review of a commissioner's order. Considering the stage in the trial at which the order was issued, the nature of the record before us, and the briefs of the parties, I do not believe that this case in its present posture presents the proper vehicle for laying down hard and fast rules to resolve all of the important issues urged upon us by the parties. As I understand, the major issue, which separates the views of the majority from those of Judge Davis, is the extent to which a finding made by an agency board on a claim for relief that can be granted under the terms of the contract will be binding in a subsequent court action for relief of the type which is not available under the terms of the contract, when the same factual question is again presented. I would reserve my decision until the facts and questions of law are adequately presented to the court at a stage in the proceedings where it can properly decide the matter.

I would also reserve decision as to the scope and effect of the Suspension of Work clause that was included in the contract in this case. Apparently both the contractor and the AEC Advisory Board on Contract Appeals considered that this clause has no application to any of the claims presented by the contractor. However, defendant argues that the Suspension of Work clause authorizes the contracting officer to pay the costs incurred by the contractor as a result of Government delays. A decision as to the application of that clause might have an important bearing on other questions to be decided in this case. However, as Judge Davis has pointed out, this case does not present that issue in its present posture.

With the foregoing preliminary statement, I concur in the result reached by the majority on the six claims covered by the trial commissioner's order.

DAVIS, *Judge*, concurring in part and dissenting in part:

1. I concur with the court in rejecting the Government's broad contention that the Disputes clause demands that *all* factual matters connected with the contract—whatever the nature of the claim—be tried and determined only by the agency board (or representative), with finality attaching to all those administrative factual findings which are adequately supported. That has never been the law during the long history of Disputes clauses. On the contrary, the finality of such findings has been recognized only when the board was considering a contractor's request under some contract provision (like the Changes, Changed Conditions, Termination for Default or for Convenience, or Suspension of Work articles) expressly authorizing the agency to grant an adjustment in price or other specific relief in defined circumstances. These alone are disputed questions "arising under" the contract. Exhaustion of the administrative remedy has not been required and finality has not been accorded where the facts relate to a type of claim, such as for a breach, which the contract does not commit to agency determination. Those disputes are connected with, but do not arise under, the contract. The administrative board can give no relief under the contract, and therefore cannot finally decide the facts.

This was the accepted distinction before the Wunderlich Act of 1954, 68 Stat. 81, 41 U.S.C. §§ 321–22.[1] There is certainly no ground for saying that that enactment changed this segment of Government contract law. The same rules have continued to be followed since the passage of that statute, both by the administrative agencies and by this court, explicitly and tacitly.[2] As the court's opinion in the present case points out, the Supreme Court's opinion in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (June 3, 1963), did not remotely suggest that these long-established rules were wrong or should be changed. That decision dealt solely with

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[1] See *Phoenix Bridge Co.* v. *United States*, 85 Ct. Cl. 603, 629–30 (1937); *Plato* v. *United States*, 86 Ct. Cl. 665, 677–78 (1938); *Langevin* v. *United States*, 100 Ct. Cl. 15, 29–31 (1943); *Silberblatt & Lasker, Inc.* v. *United States*, 101 Ct. Cl. 54, 80–81 (1944); *Benitas* v. *United States*, 101 Ct. Cl. 748, 767 *ff*, 771 (1944), *rev'd on other grounds*, 324 U.S. 768 (1945); *Holton, Seelye & Co.* v. *United States*, 106 Ct. Cl. 477, 500, 65 F. Supp. 903, 907 (1946); *Anthony P. Miller, Inc.* v. *United States*, 111 Ct. Cl. 252, 330, 77 F. Supp. 209, 212 (1948); *Hyde Park Clothes, Inc.* v. *United States*, 114 Ct. Cl. 424, 438, 84 F. Supp. 589, 592 (1949); *John A. Johnson Contracting Corp.* v. *United States*, 119 Ct. Cl. 707, 745, 98 F. Supp. 154, 156 (1951); *Continental Illinois Nat'l Bank* v. *United States*, 121 Ct. Cl. 203, 246, 101 F. Supp. 755, 759, *cert. denied*, 343 U.S. 963 (1952); *Potashnick* v. *United States*, 123 Ct. Cl. 197, 218–20, 105 F. Supp. 837, 839 (1952); *Continental Illinois Nat'l Bank* v. *United States*, 126 Ct. Cl. 631, 640–41, 115 F. Supp. 892, 897 (1953).

[2] I give only a relatively few samples. See, *e.g.*, *F. H. McGraw & Co.* v. *United States*, 131 Ct. Cl. 501, 506, 130 F. Supp. 394, 397 (1955); *John A. Johnson Contracting Corp.* v. *United States*, 132 Ct. Cl. 645, 652, 132 F. Supp. 698, 701 (1955); *Railroad Waterproofing Corp.* v. *United States*, 133 Ct. Cl. 911, 915–16, 137 F. Supp. 713, 715–16 (1956); *Peter Kiewit Sons Co.* v. *United States*, 138 Ct. Cl. 668, 151 F. Supp. 726 (1957); *Valentine & Littleton* v. *United States*, 144 Ct. Cl. 723, 726, 169 F. Supp. 263, 265 (1959); *Abbett Electric Corp.* v. *United States*, 142 Ct. Cl. 609, 613, 162 F. Supp. 772, 774 (1958); *A. S. Schulman Electric Co.* v. *United States*, 145 Ct. Cl. 399 (1959); *Snyder-Lynch Motors, Inc.* v. *United States*, 154 Ct. Cl. 476, 519, 292 F. 2d 907 (1961); *Helene Curtis Industries, Inc.* v. *United States*, Ct. Cl., No. 251–56, decided Feb. 6, 1963, slip op., pp. 53–54, 312 F. 2d 774; *W. H. Edwards Eng'r Corp.* v. *United States*, Ct. Cl., No. 218–59, decided April 5, 1963, slip op., p. 5; *Flippin Materials Co.* v. *United States*, Ct. Cl., No. 8–57, decided Jan. 11, 1963, slip op., p. 48, 312 F. 2d 408; *Ekco Products Co.* v. *United States*, Ct. Cl., No. 464–57, decided Jan. 11, 1963, 312 F. 2d 768; *Ideker Constr. Co.*, IBCA No. 124 (1957), 57–2 B.C.A. par. 1441, pp. 4845–46; *Norair Eng'r Corp.*, ASBCA No. 3527 (1957), 57–1 B.C.A. par. 1283; *Craig Instrument Corp.*, ASBCA No. 6385 (1960), 61–1 B.C.A. par. 2875; *Kenneth Holt*, IBCA No. 279 (1961), 61–1 B.C.A. par. 3060; *Model Eng'r & Mfg. Corp.*, ASBCA No. 7490 (1962), 1962 B.C.A. par. 3363, p. 17,308; *Allied Contractors, Inc.*, IBCA No. 265 (1962), 1962 B.C.A. par. 3501, pp. 17,864–65. The Advisory Board on Contract Appeals of the Atomic Energy Commission took the same position (see the court's opinion, *ante*). See, also, Spector, Is It "Bianchi's Ghost"—or "Much Ado About Nothing", 16 Admin. Law Rev. 285, 290–91 (1964).

a matter conceded to be within the scope of the Disputes clause.[3]

With this history of almost thirty years, it is far too late to try to interpret the Disputes clause anew, as if the question had emerged for the first time. The practice is too firmly rooted to be puffed aside by grammatical refinements and hortatory appeals to the "plain language" canon. The judicial, administrative, and practical construction of the clause is too entrenched for any but the strongest of assaults. We have been presented with no such overwhelming reason for making this drastic change in Government contract law at this time.

2. I disagree, however, with the majority's holding that well-supported factual findings, appropriately made by the board in deciding a dispute "arising under the contract," are not binding in a court trial of a cause of action which is outside the Disputes clause (*e.g.*, for breach, reformation, etc.). If the board has relevantly and appropriately decided a certain factual issue in connection with a claim under the Changes or Changed Conditions article, etc., and if that finding is adequately sustained by the administrative record, my view is that then the court should accept the finding in deciding the breach claim (or other claim not "arising under the contract"). There should be no *de novo* evidence and no *de novo* finding on that particular factual issue. Of course, court evidence and court findings would be entirely proper as to all factual questions, remaining in the court case, which have not been finally determined by the agency tribunal; only those particular facts which have been actually found, and which survive scrutiny under the Wunderlich Act, would be conclusive. And, of course, a board could not gratuitously exceed its mandate by wandering off and finding facts which are not a true part of, and integral to, its determination under the substantive contract clause being applied.

This position, rather than the court's, seems to me required by the terms of the Disputes clause, the phrasing of the

[3] In the case at bar, the defendant does not rely on *Bianchi* to support its broad position. The Government's Supplementary Memorandum (p. 10) says, after quoting a sentence from the *Bianchi* opinion, 373 U.S. at 714, "Thus, *Bianchi* does not decide the scope of the standard disputes agreement in Government contracts, beyond the recognition that no argument was addressed to this question."

Wunderlich Act, the principle underlying the *Bianchi* decision, and the policy of collateral estoppel.[4] Once an issue of fact arises in a controversy under the contract and is decided by the agency, the text of the Disputes clause makes that decision, if supported, final and conclusive on the parties—not simply final and conclusive for a special purpose, but final and conclusive without qualification and without limitation. The statute, too, is framed in terms of the conclusiveness, without restriction, of any supportable factual decision by the board "in a dispute involving a question arising under such contract."[5] The wording of both the Act and the contract clause seem to grant finality to all factual findings properly made by the board in the course of resolving a disputed question under the contract—not merely to the board's findings on disputed issues of fact which themselves necessarily arise under the contract.

The *Bianchi* opinion articulates the basic rationale for accepting fully the Act and the clause as they are written—avoidance of "a needless duplication of evidentiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end" (373 U.S. at 717). This major underpinning of the *Bianchi* decision likewise supports the finality, in court, of all facts validly found by the board in the course of a determination under the contract. There is no need for a second hearing on an issue already tried and resolved.

This is the same general policy which nourishes the doctrine of collateral estoppel. The court is reluctant, however, to apply that principle to these administrative findings because of the nature and genesis of the boards. The Wunderlich Act, as applied in *Bianchi*, should dispel these doubts. The

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[4] I know of no decision of this court which has addressed itself to this exact problem.

[5] 41 U.S.C. § 321 provides: "No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit not filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

41 U.S.C. § 322 provides: "No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

Supreme Court made it plain that Congress intended the boards (and like administrative representatives) to be *the* fact-finders within their contract area of competence, just as the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board are *the* fact-finders for other purposes. In the light of *Bianchi's* evaluation of the statutory policy, we should not squint to give a crabbed reading to the board's authority where it has stayed within its sphere, but should accept it as the primary fact-finding tribunal whose factual determinations (in disputes under the contract) must be received, if valid, in the same way as those of other courts or of the independent administrative agencies. Under the more modern view, the findings of the latter, at least when acting in an adjudicatory capacity, are considered final, even in a suit not directly related to the administrative proceeding, unless there is some good reason for a new judicial inquiry into the same facts. See Davis, *Administrative Law* 566 (1951); *Fairmont Aluminum Co.* v. *Commissioner*, 222 F. 2d 622, 627 (C.A. 4, 1955). The only reasons the majority now offers for a judicial re-trial of factual questions already determined by valid board findings are the same policy considerations which Congress and the Supreme Court have already discarded in the Wunderlich Act and the *Bianchi* opinion.

3. With respect to a *de novo* trial, my disposition of the six separate claims with which we have to deal would be as follows:

a. *Pier Drilling Claim:* The only aspect of this claim now before us, on the Government's request for review of the Commissioner's order, is the ruling that plaintiff can introduce *de novo* evidence on the issue of whether it was delayed into the winter (and thereby suffered damage) in the pouring of concrete. This alleged delay in pouring concrete was part of an administrative claim that plaintiff was entitled to relief, under Article 4 (Changed Conditions), for the difficulties met after it encountered "float rock." The Advisory Board could not grant monetary compensation for this delay (*United States* v. *Rice*, 317 U.S. 61 (1942)), but under the express words of Article 4 the Board could allow an exten-

sion of time for performance. In refusing to give that relief, the Board specifically found that the delay due to the "float rock" did not operate to delay the building construction (*i.e.*, the pouring of concrete). Since this issue was then properly before the Board in the proceeding under Article 4, its finding of fact must be accepted (in my view) if adequately supported. There should be no *de novo* trial of this issue.

b. *Concrete Aggregate Claim:* I agree with the court on this part of the case. The Hearing Examiner never reached the merits of any claim and therefore decided nothing (on the merits) which would be binding here. If the present demand can correctly be deemed one for breach of contract, there should be a full trial. But if the demand properly comes under the contract, the Commissioner should decide whether or not the Hearing Examiner's ruling on the timeliness of the appeal is to be upheld. If so, the claim is at an end. If not, proceedings here should be suspended to allow the Atomic Energy Commission a reasonable opportunity to determine the merits of the claim. Like the court, I intimate no view as to the character of the claim (breach of contract vs. arising under the contract).

c. *Shield Window Claim:* Plaintiff sought both compensation and an extension of time under Article 4 (Changed Conditions) for this item—just as with the Pier Drilling Claim. Basing its decision on Articles 4 and 9 (Delays—Damages), the Advisory Board, after a full hearing, made findings on the very delay for which plaintiff now seeks compensation. Those findings were rightly part of the Board's determination whether or not to grant an extension of time—relief expressly authorized by Articles 4 and 9. As indicated above, these findings, to the extent sanctioned by the administrative record, should be held binding on this court, and *de novo* evidence (directed at the same factual issues) disallowed. If there are other factual issues not covered by the Board's supportable findings, *de novo* evidence should be permitted.

d. *Shield Door Claim:* I agree with the court that plaintiff is barred by its release from now seeking delay damages

on this demand.[6] The claim made administratively was plainly one under the Changes article (Article 3) and therefore within the Board's competence. I do not concur, however, with the court's disposition of this claim on the ground that there is no allegation of arbitrary or capricious action. This is a formal defect which can easily be cured by amendment. If plaintiff does so amend, I would let the Commissioner decide whether he can adequately review the Board's findings in the absence of the oral testimony, *e.g.*, on the basis of the papers and documentary evidence. If such a review would be insufficient, I would suspend proceedings to give the Atomic Energy Commission a chance to correct the record by reconstructing the previous hearing or by holding a new one (see *United States* v. *Carlo Bianchi & Co.*, *supra*, 373 U.S. at 717–18).[7] *Bianchi*, as I read it, precludes any *de novo* judicial trial where the claim is solely under the contract and there have been administrative findings on the merits.

e. *Amercoat Paint Claim:* I agree with the court. To the extent not released,[8] this claim has been paid.

f. *Delay-Damages Claim:* The Commissioner held that, aside from the matter of the release,[9] the plaintiff's general claim for delay damages tracked the separate individual claims and should follow their disposition. I agree with this conclusion (as presumably the court does, although the opinion does not mention this phase of the case). The general delay damages claim appears to have no independent status of its own but is a recapitulation of the separate demands.

4. There are two types of *Bianchi*-related issues which this case does not present in its current posture: (a) The extent

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[6] Technically, the question of the release is not now before us on *defendant's* request for review since the Commissioner decided that point in favor of defendant. Plaintiff did not seek review. In the interests of speedy and orderly disposition of the litigation, however, it seems better to dispose of the issue now, rather than when the case comes before us on the merits or on a motion for partial summary judgment. By failing to appeal from the Commissioner's ruling, plaintiff can be deemed to have accepted at least that part of his decision. There is no suggestion in the briefs that plaintiff is preserving its position on that phase of the case.

[7] If plaintiff refuses to participate in such renewed administrative proceedings, it should be held to have abandoned the claim. If the Atomic Energy Commission refuses, "the sanction of judgment for the contractor" is available (373 U.S. at 718).

[8] See footnote 6, *supra*.

[9] The defense of release is raised by the defendant's motion for partial summary judgment which appears to cover more than the six claims now before us.

to which an administrative determination of factual questions directly related to the interpretation (rather than the application) of the contract provisions is binding in court;[10] and (b) the proper procedure where the contractor, without having pursued administrative remedies under the contract, sues for a breach, while the defendant contends that the claim *could* and *should* have been framed as a demand for administrative relief under some specific clause of the contract. Since *Bianchi*, the court has not decided these questions (and does not do so now), and I continue to reserve my position until the issues must be faced. *Cf. WPC Enterprises, Inc.* v. *United States*, Ct. Cl., No. 256–59, decided Oct. 11, 1963, slip op., p. 7, 323 F. 2d 874, 878.

[10] This is one aspect of the so-called "fact vs. law" question under the Wunderlich Act.

APPENDIX B

In the United States Court of Claims

(Filed, February 16, 1964)

No. 3–61

UTAH CONSTRUCTION AND MINING COMPANY

v.

THE UNITED STATES

COMMISSIONER'S ORDER AND MEMORANDUM RE APPLICABILITY OF BIANCHI DECISION

In March 1953 the plaintiff was awarded a contract to construct an assembly and maintenance area for the Atomic Energy Commission's National Reactor Testing Station in Idaho for completion a year later. The contract was completed on January 7, 1955, the time having been extended by defendant. Numerous claims were made by the plaintiff during and after contract performance. Some were settled and paid; others were the subject of adverse decisions by the contracting officer and the representative of the head of the department (in one instance a Hearing Examiner and in the other claims the AEC Advisory Board on Contract Appals). The particular claims presented in the petition which were considered in whole or in part administratively relate to Pier Drilling, Concrete Aggregates, Shield Doors, Shield Windows, and

Amercoat Paint. Another general catchall claim sounding in breach of contract is alleged in paragraph 9 of the petition but was not claimed administratively.

On March 22, 1957, the parties entered into a Receipt and Release under which, in consideration of the payment of $52,382.92, the plaintiff released the Government from all claims "of whatever kind or character, arising under, in connection with or by virtue of" the contract, with certain enumerated exceptions covering the administrative claims for Shield Windows, Pier Drilling, Shield Door, Concrete Aggregate, and Amercoat Paint.

On June 17, 1963, the undersigned commissioner directed the parties to file briefs to enable him to decide to what extent the case is bound by the decision in *United States* v. *Bianchi*, 373 U.S. 703 (1963). Briefs were filed by the parties indicating the need for a separate determination as to each of the several claims contained in the petition. In order to ascertain the exact nature of the administrative determinations the commissioner borrowed from the defendant the administrative files in each of the administrative appeals, and examined carefully as to each the contractor's claims and the decisions of both the contracting officer and the AEC on appeal. As a result of such examination, and in consideration of the briefs of the parties, certain conclusions were reached as set forth in the following paragraphs:

PIER DRILLING CLAIM

At the outset of its contract performance the plaintiff ran into float rock in drilling holes in the ground for concrete piers. On June 1, 1953, it notified the contracting officer that it had encountered subsurface conditions materially differing from those indicated in the drawings and specifications. On

February 18 and March 31, 1955, the plaintiff filed its formal claims with the contracting officer, the first requesting payment of the increased drilling costs caused by the changed subsurface conditions, and the second demanding payment of its costs resulting from the delays caused by the subsurface conditions which it alleged postponed the concrete pouring to the winter months. The contracting officer denied both claims, ruling that the rock encountered did not constitute a changed condition and that in any event did not entail the use of any extra drilling equipment which increased plaintiff's costs. The plaintiff appealed to the AEC. After a hearing, the ABCA ruled on April 30, 1957, that the float rock encountered by plaintiff constituted a changed condition and caused a delay in drilling and excavation, but did not cause delays throwing the concrete pouring into winter weather, which situation instead was caused by another dispute over the quality of concrete aggregates purchased by plaintiff from the Government. The record before the Board was not sufficient to determine (1) the increased costs of drilling caused by the changed subsurface conditions, or (2) whether plaintiff was liable to its drilling subcontractor under the terms of the subcontract or otherwise. The Board remanded these questions to the contracting officer for determination.

In its brief to the court the defendant says that, although the plaintiff conferred with the contracting officer subsequent to the remand of the claim by the Board, the plaintiff never undertook further proof of its increased drilling costs, and the contracting officer advised plaintiff that it considered the matter closed in the absence of further proof. The defendant says that plaintiff took no further action administratively, and that therefore the claim should be dis-

missed here for plaintiff's failure to exhaust its administrative remedies. The defendant has submitted copies of the contracting officer's correspondence with plaintiff relating to the remand, and there is no response indicated to the last letter of the contracting officer on July 25, 1958, stating that, following a conference, it was the contracting officer's understanding that plaintiff was not in a position to prove increased costs due to drilling under the Board's criteria.

The net effect of the foregoing recital of administrative proceedings is that *first,* the Board has ratified the decision of the contracting officer that the plaintiff's excavation difficulties at the outset of the contract were not responsible for the delay in pouring concrete in the winter months and the consequent winter protection expenses; and *second,* the plaintiff has failed to exhaust any administrative remedy it might have with reference to the excessive drilling costs it experienced as the result of changed subsurface conditions found by the Board.

The Board had no authority to adjudicate the first element of plaintiff's claim because the relief sought was for the recovery of unliquidated damages for delays allegedly caused by the Government. The Board's sole power under the contract was to adjudicate equitable adjustment for the changed subsurface conditions, and the plaintiff's expenses providing winter protection for the freshly poured concrete could not be paid as part of an equitable adjustment because it was not expended in direct relation to the drilling either in point of time or in function. Since the Board could not adjudicate such a claim, its findings as to the cause of the delay lack the finality accorded by the disputes clause, to findings of fact under the Disputes Clause, for findings made as to facts underlying a claim cognizable only in the courts

are merely advisory. Therefore, in reviewing the decision on this element of the claim the court is not restricted to the administrative record but may receive and consider evidence *de novo*.

As to the remanded part of the claim, the determination of the amount of the excess drilling costs is a matter of fact under the changed conditions clause, but the determination of whether plaintiff can sue in behalf of its subcontractor is a matter of law because it involves a legal interpretation of the subcontract provisions or a legal analysis of any other circumstances which might prevent the subcontractor's recovery from the plaintiff. The plaintiff had to establish both of these propositions in order to recover administratively, and no doubt the agency was ready and willing to pass on them both if the plaintiff had prosecuted its claim to the end, even though strictly speaking the Board had no authority to adjudicate the legal issue with any finality. However, since it is obvious that the Board would have done so, it cannot be said that the plaintiff had no administrative remedy available. Whether or not the agency would entertain such an application after six years of silence by the plaintiff is not for this court to say. If the plaintiff had pursued its claim and persuaded an ultimate decision by the Board that direct drilling costs in a definite amount had been expended but that the plaintiff was not legally liable to its subcontractor and so could not maintain an action in the latter's behalf, finality would attach to the finding as to costs but not as to the liability over to the subcontractor, and the latter question would then be reviewable by the court afresh on any kind of a record the parties offered.

In summary, the plaintiff is entitled to a trial before the court on the question of its delay damages involving the alleged postponement of its concrete pouring to the winter months as a result of its excavation difficulties, and no finality attaches to the adverse decision of the Board on this part of the plaintiff's pier drilling claim. But as to that part of the claim relating to excess costs of drilling the court's action is restricted to a determination of whether the decision below (if any) was arbitrary, capricious, or not supported by substantial evidence in the administrative record.

CONCRETE AGGREGATES CLAIM

The contract involved a large quantity of concrete construction. It provided that the contractor could purchase suitable aggregates from Government supplies or from other sources, but imposed no obligation on the plaintiff to purchase from the Government. The plaintiff elected to purchase aggregates from the Government. Early in the performance period (July 1953) it was discovered that the concrete initially poured was under strength, and that the dirty condition of the aggregate was at least partially responsible. Whereupon, the Government undertook to wash the aggregates to bring them up to specification requirements. While this was being done it directed the plaintiff to increase the strength of the concrete by adding one sack of cement in each cubic yard of concrete mix. This was done for several months until the condition of the aggregates improved to the point that adequate strength was obtained without using the extra sack of cement. Pursuant to plaintiff's request of July 31, 1953, for payment of the extra cement used as a changed condition, and plaintiff's later billing in February 1954 in the amount of

$8,640.93 for the cost of the extra cement including "supervision, general expense, and profit", the defendant issued Modification No. 6, part of which reimbursed the plaintiff in the amount it had claimed for this item. The contract was completed in January 1955, and it was not until July 1956 that plaintiff filed a claim with the contracting officer for approximately $109,000 for costs stated to have been incurred because of the poor condition of the aggregates.

The contracting officer rejected the claim on the grounds that it appeared to be one for breach of contract, not properly before him under the Disputes Article, and in the alternative that (1) the claim was untimely, and (2) the plaintiff had failed to explain the nature of the additional costs it was claiming.

The plaintiff duly appealed to the AEC in January 1957 under Article 15 of the contract and requested a hearing.

In March 1957 the plaintiff executed a general receipt and release under which, for $52,382.92, it released the defendant from all claims "arising under, in connection with or by virtue of" the contract, specifically excepting certain enumerated claims including "Concrete aggregate claim for additional compensation to Contractor".

Under newly inaugurated procedures of the AEC the plaintiff's appeal was assigned to a Hearing Examiner. In May 1959 the contracting officer filed motions to dismiss the appeal proceeding for lack of jurisdiction [i.e., breach of contract], and failure to make timely presentation of claim, and filed a third motion for a more definite statement. A hearing was held before the Hearing Examiner on the motions.

Subsequently the plaintiff filed a brief in opposition to the motions.

On October 1, 1959, the Hearing Examiner filed his decision which contained findings and determinations. The plaintiff's appeal was denied and the contracting officer's motion to dismiss for plaintiff's failure to make a timely presentation of its claim was granted. No hearing on the merits was held. The plaintiff did not petition the AEC for review of the Hearing Examiner's decision as provided in the Rules of Procedure in Contract Appeals (Sec. 330 and 3.31).

The decision of the Hearing Examiner discussed all phases of the appeal, made specific findings of fact, and dismissed the appeal on the stated ground that the claim was not timely. However, the decision also observed that, although plaintiff had based its claim under the Changed Conditions Article, the article was not applicable because the condition of the aggregates was visible on inspection and hence was not an unknown condition. Moreover, if the plaintiff's theory was on breach of warranty of fitness of the aggregates, such a claim would not be within the jurisdiction of the AEC.

It must be concluded that the *Bianchi* decision does not apply to the claim for aggregates, primarily because the decision of the Hearing Examiner of the AEC was predicated upon oral argument of counsel addressed to dispositive motions, and was not based upon a hearing on the merits affording plaintiff an opportunity (as it had requested) to present evidence. Further, the Hearing Examiner disposed of the appeal on the stated ground that the claim was not timely in its presentation, although neither the contract nor any cited regulations prescribe a definite time for the filing of such claims other than the re-

quirement of the Changed Conditions Article that notice of a claim thereunder be given immediately by the contractor. Whether a claim such as the present one, sounding in unliquidated damages, filed one and one-half years after completion of performance under the contract is timely is a question involving the discretionary judgment of this court, assuming that in any event the agency has jurisdiction over such a claim. The contracting officer felt that he had no such jurisdiction because the claim was for unliquidated damages.

If the claim was for unliquidated damages for breach of warranty that the aggregates were suitable and is thus beyond the jurisdiction of the agency, then three consequences ensue to the defendant's position:

(1) No requirement existed that the claim be appealed to the AEC.

(2) The defendant's argument fails that the plaintiff has failed to exhaust its administrative remedy by failing to seek a review by the AEC of the adverse decision of the Hearing Examiner.

(3) There need be no remand to the AEC to hold a hearing on the merits.

It is not specifically mentioned by the defendant in its brief, but in comparable situations the Government has urged that factual decisions by the agency underlying legal decisions over which the agency lacks jurisdiction, nevertheless possess finality on review by this court. In view of the rulings by the court in comparable situations any argument, if made, that the Hearing Examiner's decisions as to the facts possess finality, would not be tenable.

The plaintiff is entitled to a *de novo* trial on the issue of concrete aggregates, and no finality attaches to the AEC decision on this item of the claim.

SHIELD WINDOWS CLAIM

Under the original contract the plaintiff was to install shield windows to be furnished by the defendant. Shield windows were elaborate viewing apertures to permit personnel to watch developments inside specially insulated rooms, without radioactive leakage. They involved special seals and several thicknesses of special glass filled with fluid which would shield radioactive rays but not impede vision. Shortly after the award of the contract a Modification was issued requiring the plaintiff to furnish the shield windows by subcontract with a Government-approved supplier, and a subcontract was let to Corning, which was about the only supplier experienced in this limited field. There is strong indication that during the performance of the contract the Government and its firm of Architect-Engineers had numerous conferences with Corning from which plaintiff was excluded, so that in practical effect (as the ABCA eventually found) Corning was more like a vendor to the Government than a subcontractor to the plaintiff, because of the latter's lack of effective control.

The plaintiff experienced difficulties with the assembling and installation of the shield windows. In June 1954 the plaintiff notified the contracting officer that changed conditions had been encountered materially altering the scope of the work and forcing plaintiff to suspend all operations until the extent of the changed conditions was determined and the contract modified to reflect them. Specifically the changed conditions related to the Koroseal gaskets for the shield windows and the adequacy of the glass in the shield windows supplied by Corning according to specifications. The plaintiff contended that the

design of the Architect-Engineer for the gaskets was faulty and that the defendant's Architect-Engineer was arbitrarily reading into the specifications requirements for selected window shield assemblies not called for by the leading authorities. The contracting officer denied the plaintiff's claim for relief and directed it to proceed, holding in effect that there was nothing wrong with the specifications for the Koroseal gaskets and glass for the shield windows. On July 23, 1954, plaintiff appealed to the AEC and requested a hearing which was held.

On July 23, 1957 the AEC Advisory Board on Contract Appeals (ABCA) rendered its decision on plaintiff's appeal for a time extension, and equitable allowances for additional costs incurred because of the alleged changed conditions (apparently at some interim time the plaintiff had changed the nature of its claim from the form originally presented to the contracting officer). The Board considered the issue to be whether the plans and specifications were adequate to achieve the desired result, assuming the plaintiff's competence. Plaintiff contended that the delays it suffered were not its responsibility but were due in part to the AEC's arbitrary action in bypassing plaintiff and in part to the arbitrary action of the Architect-Engineer and the Corning Glass Company.

At the conclusion of a remarkably thoughtful and sympathetic opinion the Board denied plaintiff's appeal for an equitable adjustment for increased costs but allowed the appeal for an extension of time for excusable delay, and remanded the latter to the contracting officer for computation. The question for remand became moot when the defendant extended the plaintiff's overall time to the actual contract completion date. The Board made a series of specific findings of fact which in effect put the blame for the

series of delays on neither side to the exclusion of the other, and instead held that the delays were chiefly the result of the inherent difficulties of assembling and installing shield doors and windows recognized to be beyond the knowledge and experience of any person or company, and which involved new techniques.

The Board findings enumerated the specific delays which apparently involved a substantial total of lost time. It does not appear in the decision that the plaintiff particularized or even totaled its claim for equitable adjustment, so it cannot be determined from the administrative record what part of its claim would be for direct costs reimbursable under the contract and what part (if any) would be delay damages. Assuming that, the Board would have had no jurisdiction to adjudicate a claim for delay damages (quite apart from the authority of the agency to *settle* such a claim), it is apparent that the basic issue involved in the administrative proceeding was whether the plaintiff was unreasonably delayed by actions of the Government, a typical delay damages type of inquiry sounding in unliquidated damages.

Accordingly, since the final settlement and release entered into on March 22, 1957 reserved plaintiff's claim for "additional compensation" covering the shield windows complaint, it is concluded that the decision of the Board lacks finality, that the *Bianchi* decision does not apply, and that the plaintiff is entitled to a *de novo* trial in this court on the question of delays. It is urged, however, that the parties give full consideration to the possibility of obviating or at least curtailing the trial by adoption of the administrative record, which includes many exhibits and a 453-page transcript of testimony taken during a three-day hearing. It may be that the requirements of the parties as to the facts of the claim may be fully

satisfied in the existing record, and that they would merely want the court to reappraise the evidence *de novo* without any bar of finality to overcome.

Finally, the defendant alleges in its answer that plaintiff has failed to allege that the action of the Board was arbitrary, capricious, etc. Assuming that the Board had no jurisdiction over the type of claim it considered, such allegations in the petition would be superfluous.

SHIELD DOOR CLAIM

On January 28, 1955, the plaintiff submitted a claim of $4,457.25 to the contracting officer in the form of a proposal for a change order covering extra work on certain shield doors ordered by the Architect-Engineer a year earlier by means of changes made on shop drawings prepared by plaintiff's subcontractor. By a supplemental letter plaintiff asked for a time extension due to the delays involved.

On October 27, 1955, the contracting officer denied the claim on the principal ground that the plaintiff had presented its claim a year late instead of within 10 days, as required by the Changes Article, and on the further ground that the changes made by the Architect-Engineer to the shop drawings did not change the contract drawings and specifications and thus constitute extra work. The plaintiff appealed to the AEC and a hearing was held before the ABCA. Through mistake no reporter was present to transcribe the testimony, but by agreement of the parties this was waived.

The Board made its decision on April 25, 1957, denying plaintiff's claim for adjustment under the changes clause but granting its claim for a time extension, remanding the latter to the contracting officer to determine the amount of the time exten-

sion. As to the major part of the plaintiff's claim the Board held that, while the contract drawings were inexcusably in error, the specifications themselves were adequate, so that the changes made by the Architect-Engineer to the subcontractor's shop drawings did not constitute changes under the changes clause. As to other changes, made by the Architect-Engineer to the subcontractor's shop drawings, the Board held that they did constitute changes to the contract drawings and specifications, but that the plaintiff's failure to present its claim within the 10-day period prescribed by the Changes Article barred any right to recovery, although the contracting officer had the discretion to consider such a claim but was not required to. The Board then remanded the plaintiff's claim for a time extension to the contracting officer to determine the amount.

Three major points are to be made: First, the failure of the Board to prepare a transcript of its hearing prevents an adequate review by the court, and this lack is not cured because the plaintiff may have agreed to having no transcript made. The omission could be corrected by return of the claim to the Board for rehearing, but it is not believed that the *Bianchi* decision requires such a remand in every case where the prospect of even greater delay would be assured. The *Bianchi* decision must be read with discretion, and the Supreme Court's admonition against "delay at its worst" should be given consideration. To return the claim to the Board for a redetermination on the basis of a complete record would add perhaps several more years to the ultimate decision of a claim already 10 years old in its inception.

Second, it is observed that certain aspects of this item of claim might well have been subjected to a

dispositive motion (if seasonably brought), such as the delay in presentation of the claim administratively and possibly the lack of authority of the Architect-Engineer, thus avoiding a trial.

Third, it is noted that at no time did the plaintiff claim administratively anything other than its direct costs, and made no claim for delay damages as it makes for the first time in paragraph 7(c) of its petition. On March 22, 1957, the plaintiff executed a full receipt and release with enumerated exceptions, including "Shield Door Claim for additional compensation to Contractor". In view of the fact that the contracting officer was empowered to *settle* all kinds of claims (whether liquidated or unliquidated, sounding in breach of contract outside or inside the contract), it would seem that the plaintiff's failure to advance such a claim for settlement in the negotiations leading up to the final release would preclude the contractor from advancing it later as an afterthought. It would be a disservice to the contracting officer to permit a contractor to remain silent as to his potential claims while the parties are negotiating a final settlement, and then, after agreement is reached on a supposedly all-inclusive amount, the contractor reveals his new claims. The willingness of the contracting officer to enter into a final payment agreement would necessarily be substantially affected by his knowledge of delay claims, and if the contractor remains silent he is bound by his acceptance of the final settlement by way of accord and satisfaction. The particular reservation which the plaintiff inserted in the release in question would mean to the contracting officer only those direct costs relating to shield doors which the plaintiff had previously placed in issue, and would not include other aspects of the same claim which plaintiff had held quietly in reserve. The

precise situation was present in the recommendations for conclusions of law filed by this commissioner in *Brock & Blevins Company, Inc.*, v. *United States*, No. 292–59, on December 6, 1963, and the reasoning given there is incorporated here by reference.

In short, the plaintiff is entitled to a *de novo* trial on those shield door costs which it claimed administratively, but not as to any collateral delay costs which it advanced subsequent to the execution of the release on March 22, 1957.

AMERCOAT PAINT CLAIM

In March 1954 it was discovered that various metal components furnished by defendant for the "hot shop" required de-rusting and painting with Amercoat. Plaintiff performed this work under protest, contending that it was outside of the painting specifications and involved dismantling, sandblasting, etc. There was some disagreement as to whether Amercoating the shield doors should be considered as part of the plaintiff's obligation to Amercoat the "hot shop" walls. The contracting officer's decision in June 1954 that shield doors were movable walls and thus were contract obligations of plaintiff to paint was reversed in December 1954 by successor Government representatives, and the parties agreed to a settlement formula as to the direct costs of the extra painting. It does not appear that the plaintiff made any administrative claim for delay damages in this connection as it is urging here. The defendant contends that plaintiff was paid in full for this Amercoating claim, and that the only reservation in the release executed by plaintiff in March 1957 was as to an amount withheld but subsequently paid to plaintiff for some defective paint work. The defendant

also says that the present claim for extra work and changed conditions is not relevant to a breach of contract action.

Since the plaintiff did not advance its present claim for delay damages at any time prior to execution of the release in March 1957 and the sole claim reserved in the release was later paid, on the principle of accord and satisfaction the plaintiff should be barred from further recovery. The immediate issue is whether *Bianchi* applies to preclude a *de novo* consideration of the administrative decision, and the above observation as to accord and satisfaction is technically not relevant and should perhaps be the subject of an appropriate motion. However, since the object of the present proceeding is to ascertain what areas of the claim will require trial, it is relevant to rule that, for other reasons, a trial here should be denied and court review be limited to an examination of the administrative record.

DELAY-DAMAGE CLAIM

In paragraph 9 of its petition the plaintiff claims $1,100,965.23 for defendant's failure throughout the contract to (1) "formulate a desired end-result prior to the award", and (2) "prepare adequate plans and specifications", thereby "imposing additional design and extra work through shop-drawing procedures". It was alleged as part of this claim that the defendant's procedure for approval of shop drawings was slow and compounded the effect of other delays. The allegations made in support of this item of claim, to the extent they can be understood, seem to amount in large part to a catch-all category overlapping to an unknown extent certain parts of the specific claims made administratively as described in other parts of this document. No such claim was made administra-

tively at any time prior to the release executed in March 1957, and none of the exceptions in the release correspond to this claim. The claim itself appears to be one for breach of contract for delays and contemplates unliquidated damages (despite the precision of the amount claimed), so that it would not have been cognizable by the AEC even if it had been presented. But the fact that it had not been presented and was not excepted in the release would make its entertainment in a review proceeding in this court dubious, for reasons given as to other specific claims. This is more properly a subject-matter for a dispositive motion rather than the present determination of the applicability of the *Bianchi* rule. To the extent any of the elements of the claim are duplicated in the specific claims as to which a *de novo* consideration has been recommended, they are not subject to the *Bianchi* rule and trial here should be accorded, but as to the balance presented for the first time in the petition in this case and never presented administratively, no trial should be allowed but a dispositive motion should be entertained.

C. MURRAY BERNHARDT,
Commissioner.

FEBRUARY 18, 1964.

APPENDIX C

1. The Act of May 11, 1954, 68 Stat. 81 (The Wunderlich Act), 41 U.S.C. 321–322) provides:

> § 321. *Limitation on pleading contract-provisions relating to finality; standards of review.*
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> § 322. *Contract-provisions making decisions final on questions of law.*
>
> No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

2. The contract (Exhibit A to the petition in the Court of Claims) provided in pertinent part:

> Article 3. *Changes*
>
> The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or speci-

fications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. *Changed conditions.*

Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

Article 9. *Delays—Damages.*

If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government make take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day or delay until the work is completed or accepted the amount as set forth in the specifications of accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided,* That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another

contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

Article 15. *Disputes.*

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

GC–25. *Suspension of work.*

The Commission may by written order direct the Contractor to suspend all or any part of the work for such period of time as may be determined by the Commission to be necessary or desirable for the convenience of the Govern-

ment. If such suspension delays the progress of the work and causes additional expense or loss to the Contractor in the performance of the work, not due to the fault or negligence of the Contractor, the Commission shall make an equitable adjustment in the contract price and time of performance and modify the contract accordingly: *Provided, however,* that no adjustment will be made under this article for suspensions ordered under any other article of the contract or provision of the specifications; and *provided further,* that any claim for adjustment hereunder must be asserted within 30 days from the date such suspension is ordered. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in the article of this contract entitled "Disputes".

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